LIBRARY
SUPREME COURT, U. S.

FILED
MAY 1 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1322

In the Matter

of

IRA HAUPT & Co., a Limited Partnership,

Bankrupt.

KAMERMAN & KAMERMAN,

Petitioner,

vs.

CHARLES SELIGSON, as Trustee in Bankruptcy of Ira Haupt & Co.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES SELIGSON
Trustee in Bankruptcy
1290 Avenue of the Americas
New York, New York 10019
212-LT 1-7510

SELIGSON & MORRIS
HARVEY R. MILLER
Of Counsel

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
OPINIONS AND ORDERS BELOW	2
STATUTES INVOLVED	3
STATEMENT	3
ARGUMENT	
I. Section 302 of Chapter XI of the Bankruptcy Act is inapplicable to ordinary bankruptcy proceedings conducted under Chapters I through VII of the Act	6
II. Pursuant to Section 378(1) of the Bankruptcy Act, upon dismissal of a Chapter XI petition filed under Section 321 of the Act, the ensuing bankruptcy proceeding is conducted as if the Chapter XI petition has not been filed	9
III. Pursuant to the provisions of Section 391 of the Bankruptcy Act the period of time within which a Trustee could commence actions to recover preferences is suspended while a Chapter XI proceeding is pending and until it is finally dismissed	13
IV. No sound reasons exist for the granting of the petition for a writ of certiorari	14
CONCLUSION	15
APPENDIX	1a

TABLE OF CITATIONS

PAGE

Cases:

Hamilton v. Rathbone, 175 U. S. 414 (1899) 9

Johnston Construction Inc., In re, 182 F. Supp. 576 (S.D. Cal. 1960) 11

Rice v. Sioux City Cemetery, 395 U. S. 70 (1955) 14

Rosenberg v. Fleutic, 374 U. S. 449 (1963) 12

Statutes:

Bankruptcy Act:

Section 1(12), 11 U.S.C., §1(12) 3, 9

Section 11e, 11 U.S.C., §29e 5, 9, 13

Section 39c, 11 U.S.C., §67c 2, 3

Section 57g, 11 U.S.C., §93g 3, 4

Section 60a, b, 11 U.S.C., §96a, b 3, 4

Section 302, 11 U.S.C., §702 ..... 5, 6, 7, 8, 9, 14

Section 321, 11 U.S.C., §721 ..... 3, 9, 10, 11, 12

Section 322, 11 U.S.C., §722 ..... 11, 12

Section 378(1), 11 U.S.C., §788(1) 9, 10, 11, 12, 13, 14

Section 378(2), 11 U.S.C., §778(2) 11, 12

Section 391, 11 U.S.C., §791 ..... 3, 13, 14

Miscellaneous:

8 *Collier*, Bankruptcy, ¶1.01 (14th ed. 1964) 7

8 *Collier*, Bankruptcy, ¶1.02 (14th ed. 1964) 7

9 *Collier*, Bankruptcy, ¶10.10 (14th ed. 1964) 8

INDEX TO APPENDIX

	PAGE
Bankruptcy Act:	
Section 1(12), 11 U.S.C., §1(12)	1a
Section 39c, 11 U.S.C., §67c	1a
Section 57g, 11 U.S.C., §93g	2a
Section 60a(1), 11 U.S.C., §96a(1)	2a
Section 60b, 11 U.S.C., §96b	2a
Chapter XI of the Bankruptcy Act:	
Section 391, 11 U.S.C., §791	3a
Referee's Order of December 14, 1966, Granting Motion for Reargument and Denying Motion to Dismiss (R.6-R.9)	4a

IN THE

Supreme Court of the United States

October Term, 1967

No. 1322

In the Matter

of

IRA HAUPT & Co., a Limited Partnership,

Bankrupt.

KAMERMAN & KAMERMAN,

Petitioner,

vs.

CHARLES SELIGSON, as Trustee in Bankruptcy of Ira Haupt & Co.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Questions Presented

1. Is Section 302 of Chapter XI of the Bankruptcy Act applicable to ordinary bankruptcy proceedings under Chapters I through VII of said Act?

2. Under Section 375(1) of the Bankruptcy Act, which becomes operative upon the dismissal of a Chapter XI petition filed pursuant to Section 321 of the Act, is the period of limitation prescribed by Section 11e of the Bankruptcy Act measured from the actual date of adjudication?

3. Does Section 391 of the Bankruptcy Act suspend during the pendency of a Chapter XI proceeding all periods of time prescribed by said Act for the commencement of actions by a *trustee in bankruptcy* to recover voidable preferences?

Opinions and Orders Below

Petitioner herein seeks the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Court of Appeals") in connection with the opinion and order of the Court of Appeals made and entered on February 2, 1968 (A1-A11).[1] The opinion and order of the Court of Appeals affirmed an order of the United States District Court for the Southern District of New York ("District Court") which determined that an action instituted by the trustee in bankruptcy herein to recover voidable preferences under the Bankruptcy Act, against Kamerman & Kamerman, was timely (A12-A22).

The opinion and order of the District Court, *supra*, had affirmed an order entered by the referee in bankruptcy, dated December 14, 1966.[2]

---

1. References in parentheses preceded by "A" refer to pages of Petitioner's Appendix A.

2. The petition herein fails to refer to the order of December 14, 1966, which is the order which was reviewed by the District Court in accordance with Section 39c of the Bankruptcy Act, 11 U.S.C., §67c.

The full text of the aforesaid order is set forth in Respondent's Appendix (4a-7a).[3]

Statutes Involved

The instant petition concerns, in addition to the provisions of the Bankruptcy Act set forth in Petitioner's Appendix B, the following sections of said Act: Section 1(12), 11 U.S.C., §1(12); Section 39c, 11 U.S.C., §67c; Section 57g, 11 U.S.C., §93g; Section 60a(1), b, 11 U.S.C., §96a(1), b; and Section 391, 11 U.S.C., §791, which are each set forth in Respondent's Appendix (1a-3a).

Statement

The relevant and salient facts pertaining to the petition at bar are as follows:

1. On March 23, 1964, an involuntary petition in bankruptcy was filed with the District Court against Ira Haupt & Co., a limited partnership ("Haupt") (A1).

2. Within four months prior to the filing of the aforesaid involuntary petition in bankruptcy, Kamerman & Kamerman, Petitioner herein, received transfers of property of Haupt aggregating $20,700 (A1-A2).

3. On March 30, 1964, a petition under Chapter XI, Section 321 of the Bankruptcy Act, 11 U.S.C., Section 721, was filed with the District Court in the pending bankruptcy proceeding, purportedly in behalf of Haupt (A2-A3).

3. References in parentheses followed by "a" refer to pages of Respondent's Appendix.

4. Subsequent thereto a motion was made to dismiss the Chapter XI petition and on June 10, 1964, the referee in bankruptcy granted the motion to dismiss and found that the filing of the Chapter XI petition was not the voluntary act of Haupt. The referee noted that the managing partner of Haupt, Morton Kamerman, did not join in the Chapter XI petition (A3).

5. By order and decree dated June 26, 1964, Haupt was adjudged a bankrupt (A3).

6. Kamerman & Kamerman filed with the Bankruptcy Court a proof of debt against Haupt which has neither been allowed nor disallowed (A3).

7. On October 6, 1964, Charles Seligson was appointed as Trustee of the estate of the bankrupt ("Respondent" or "Trustee"), and thereafter qualified and has acted as Trustee since October 7, 1964 (A3).

8. By notice of motion dated May 20, 1966, the Trustee instituted a proceeding objecting to the claim of Kamerman & Kamerman and requesting that said claim be disallowed in accordance with Section 57g of the Bankruptcy Act, 11 U.S.C., Section 93g, unless Kamerman & Kamerman surrender and turn over to the Trustee the sum of $20,700 with interest, said moneys representing voidable preferences under Section 60a, b of the Bankruptcy Act, 11 U.S.C., Section 96a, b (A3-A4).

9. Kamerman & Kamerman interposed an answer to the Trustee's application and alleged, *inter alia*, that the Trustee's objection and application although commenced

within two years of the actual date of adjudication was not commenced within two years of the date of the filing of the jurisdictionally void Chapter XI petition and was, therefore, "barred pursuant to the provisions of Section 11(e) [sic] and 302 of the Bankruptcy Act" (R22-R25).[4]

10. Thereafter Kamerman & Kamerman moved to dismiss the Trustee's application and after argument, the referee in bankruptcy rendered an opinion, dated October 21, 1966, granting the motion to dismiss on the basis that Section 302 of Chapter XI was applicable to and governed the ordinary bankruptcy proceedings involving Haupt. Before an order was entered in respect of the decision of the referee in bankruptcy, the Trustee moved for reargument of the motion to dismiss and on November 18, 1966 reargument was granted and upon further consideration the referee orally reversed his prior decision of October 21, 1966 (A4). On December 14, 1966, the referee entered the order denying the motion to dismiss stating the bases therefor (4a-7a).

11. A petition for review of the order of December 14, 1966, was heard before the District Court and on August 15, 1967, that Court affirmed the referee's order of December 4, 1966 (A4).

12. By decision dated February 2, 1968, the Court of Appeals affirmed the orders of the District Court and the referee in bankruptcy (A1-A11). A petition for rehearing was denied on March 21, 1968.

---

4. Numbers in parentheses preceded by "R" refer to pages of the record docketed by Petitioner.

ARGUMENT

I

Section 302 of Chapter XI of the Bankruptcy Act is inapplicable to ordinary bankruptcy proceedings conducted under Chapters I through VII of the Act.

The entire foundation of Petitioner's contentions in the lower courts and before this Court is to the effect that Section 302 of the Bankruptcy Act is applicable to ordinary bankruptcy proceedings following the dismissal of an aborted Chapter XI proceeding.

Section 302 provides in pertinent part:

> "*The provisions of chapters I to VII, inclusive of this Act shall, insofar* as they are not inconsistent with or in conflict with the provisions of this chapter, *apply in proceedings under this chapter* [Chapter XI] * * *. For the purposes of such application * * * date of adjudication shall be taken to be the date of the filing of the [Chapter XI] petition under section 321 or 322 of this Act except where an adjudication had previously been entered." (Emphasis supplied.)

Thus, Kamerman & Kamerman contends that the constructive adjudication in bankruptcy set forth in Section 302 effective during proceedings under Chapter XI supersedes the date of actual adjudication in bankruptcy made in a subsequent ordinary bankruptcy proceeding under Chapters I to VII. The Court of Appeals disagreed with Petitioner's contention and stated:

> "The difficulty with appellant's contention is that, after a petition for an arrangement has been dis-

missed, we are no longer dealing with a proceeding under Chapter XI. Section 302 merely purports to indicate that certain provisions of the straight bankruptcy chapters are applicable to a Chapter XI proceeding, not *vice versa.* If this distinction is not apparent from the language of Section 302 itself, Section 301, 11 U.S.C., §701 makes it quite clear:

> 'The provisions of this Chapter [Chapter XI] shall apply exclusively to proceedings under this Chapter.' " (A7, Emphasis by Court)

Patently Section 302 of the Bankruptcy Act is simply an *enabling* provision adopted by the Congress to allow the application of certain provisions of Chapters I through VII of the Bankruptcy Act to proceedings under Chapter XI.

Petitioner's contentions that the decision of the Court of Appeals "* * * is not in accord with the views of leading texts on the subject" is wholly inaccurate. The only text referred to by Petitioner is *Collier,* Bankruptcy. However, it is stated in 8 *Collier,* Bankruptcy ¶1.01 p. 3 (14th ed. 1964):

> "Although numerous provisions in other chapters of the Bankruptcy Act are applicable to an arrangement proceeding under Chapter XI, *the converse is not true* and the provisions of Chapter XI *do not apply to proceedings under other chapters of the Act.*" (Emphasis supplied.)

See also: *Ibid.,* n 3.

Similarly, at ¶1.02 of the aforesaid volume it is stated:

> "*Sections 302, 312, 316, 341 and 352 refer to the applicability of the provisions of Chapter I to VII only*

during the administration of a proceeding under Chapter XI. Under certain circumstances, an order may be entered in a Chapter XI proceeding directing bankruptcy. If that happens, §§302, 312, 316, 341 and 352 *have no reference to the applicability of the provisions of Chapters I to VII during the subsequent bankruptcy administration of the proceeding.* That is governed in general by §378, under which the proceeding is thereafter administered in substantial effect under all the provisions of Chapters I to VII, and with a few exceptions *is no longer administered pursuant to the provisions of Chapter XI.*" (Emphasis supplied.)

At 9 *Collier* Bankruptcy ¶10.10 pages 509-10 (14th ed. 1964), it is stated that upon the entry of an order dismissing a Chapter XI proceeding and directing that bankruptcy be proceeded with:

> "In both a §321 and a §322 case, the general effect of §378 thus is that the proceeding is no longer administered pursuant to the provisions of Chapter XI, but is thereafter administered pursuant to the provisions of Chapters I to VII, which deal with the ordinary bankruptcy proceeding commenced by the filing of a petition for adjudication in bankruptcy. * * * Apart from §§338, 354, and 378, *the provisions of Chapter XI do not govern* the future conduct of the proceeding after bankruptcy has been directed." (Emphasis supplied.)

Manifestly, Section 302 of the Act has no application to ordinary bankruptcy proceedings even according to the treatise relied upon by Petitioner. This conclusion is self-evident from the language of said Section itself. It is a cardinal principle of statutory construction that "* * * where the act is clear upon its face, and when standing

alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v. *Rathbone*, 175 U. S. 414, 419 (1899). Section 302 is susceptible of but one construction, i.e., it is an enabling provision exclusively limited in application to proceedings under Chapter XI.

Consequently, the basic premise urged by Petitioner herein is ill conceived and singularly devoid of merit.

II

Pursuant to Section 378(1) of the Bankruptcy Act, upon dismissal of a Chapter XI petition filed under Section 321 of the Act, the ensuing bankruptcy proceeding is conducted as if the Chapter XI petition had not been filed.

Pursuant to Section 11e of the Bankruptcy Act, the period of limitation within which a Trustee may institute proceedings in behalf of a bankrupt estate, unless otherwise provided by federal or state law, pursuant to Section 11e of the Bankruptcy Act is measured from the "date of adjudication." Section 1(12) of the Bankruptcy Act, 11 U.S.C., §1(12) provides:

> " 'Date of adjudication' shall mean the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed."

Haupt was actually adjudged a bankrupt on June 26, 1964, the date of the entry of the decree of adjudication. In determining the effect of a dismissal of an aborted

Chapter XI proceeding, it is appropriate to refer to Article X of Chapter XI of the Bankruptcy Act entitled "Dismissal and Adjudication" and particularly, Section 378, 11 U.S.C., §778, set forth in said Article. As the Court of Appeals stated: "[A]n analysis of Section 378 indicates that it, rather than Section 302 is the controlling provision after a Chapter XI has been dismissed." (Emphasis by Court.)

Section 378 of the Bankruptcy Act provides as follows:

> "Upon the entry of an order directing that bankruptcy be proceeded with—
>
> (1) in the case of a petition filed under section *321* of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, *as if such petition under this chapter had not been filed*; and
>
> (2) in the case of a petition filed under Section *322* of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by the creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act." (Emphasis supplied.)

Inasmuch as the Chapter XI petition in this case was filed under Section 321 of the Act, Section 378(1) is the governing statutory provision. In accordance therewith,

the ordinary bankruptcy proceeding which was commenced against Haupt on March 23, 1964, must be conducted as if the aborted Chapter XI petition had not been filed. The plain and clear meaning of Section 378(1) cannot be seriously controverted. As stated by the Court of Appeals:

> "Where a Chapter XI proceeding has been initiated by a Section 321 petition, as in the present case, Section 378(1) is applicable and there is nothing in Section 378(1) to suggest that the date of adjudication should be any date other than the actual date that the person was adjudged a bankrupt." (A10)

Thus, in *In re Johnston Construction, Inc.*, 182 F. Supp. 576, 577 (S.D. Cal. 1960), the Court stated:

> "It is clear that in a case where bankruptcy proceedings were pending at the time the petition for arrangement was filed, that is to say a §321 case, the Referee, where the plan for arrangement is not confirmed, must restore the status quo ante and proceed as though the petition for arrangement had not been filed."

In contrast to Section 378(1) subdivision (2) of Section 378 governing the case of a Chapter XI petition filed pursuant to Section 322 of the Act, specifically provides that the date of the filing of the Section 322 Chapter XI petition shall be the date of adjudication. The inclusion in Section 378(2) of specific language defining the date of adjudication for the purposes of the ensuing bankruptcy proceeding excludes any implicit incorporation into subdivision (1) of said Section of similar language to create the effect that the date of filing of a Section 321 petition constitutes the date of adjudication for the purposes of the ordinary bankruptcy. *Expressum facit cessare tacitum.*

The very fact that Congress did not include in subdivision (1) of Section 378 language to the same effect conclusively demonstrates that it was not intended that the date of the filing of a Section 321 petition should be the date of adjudication for the purposes of the interrupted bankruptcy proceeding. Petitioner herein would have the Court equate the different types of Chapter XI petitions and apply Section 378(2) to the Haupt proceeding thereby fixing the date of adjudication as of March 30, 1964, notwithstanding that Section 378(2) by its specific language is limited to Chapter XI petitions filed under Section 322.

It is a paramount rule of statutory construction that wherever possible a statute should be construed so as to give effect to all of its provisions. *Ut res magis valeat quam pereat.* To adopt Petitioner's contention is to emasculate the language of Section 378(1) and render the same of no effect. As stated by this Court in *Rosenberg* v. *Fleutic,* 374 U. S. 449, 463 (1963):

> " 'Statutory construction' means to me that the Court can *construe* statutes but not that it can construct them." (Emphasis by Court)

Adoption of Petitioner's contention as to Section 378 would literally require the Court to reconstruct the statutory provisions.

III

Pursuant to the provisions of Section 391 of the Bankruptcy Act the period of time within which a Trustee could commence actions to recover preferences is suspended while a Chapter XI proceeding is pending and until it is finally dismissed.

In accordance with Section 378(1) the Court of Appeals determined that the period of limitation within which the Trustee could commence actions to recover preferences began to run from the actual date of adjudication. In accordance therewith, the Trustee's action against Kamerman & Kamerman commenced within two years of the date of adjudication was timely. As a consequence, the Court of Appeals did not have to consider the applicability of Section 391 of the Bankruptcy Act, 11 U.S.C., §791, which provides as follows:

> "All statutes of limitation affecting claims provable under this chapter and *the running of all periods of time prescribed by this Act in respect to* the commission of acts of bankruptcy, the *recovery of preferences* and the avoidance of liens and transfers *shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.*" (Emphasis supplied)

Patently, Section 11e prescribes a period of time within which the Trustee may institute proceedings based upon any claim to recover a voidable preference under the Bankruptcy Act. The plain language of Section 391 establishes that while a Chapter XI proceeding is pending the running of the two-year period of time prescribed by Section 11e, is suspended as against a trustee in bankruptcy.

As indicated by the Court of Appeals, Section 391 becomes operable only after the statute of limitations has commenced to run. Inasmuch as the Court of Appeals found that the statute of limitations did not commence to run in the case at bar, Section 391 was not significant in the decision of the Court of Appeals. However, assuming that the statute of limitations had commenced to run, Section 391 provides that, "the running of all periods of time prescribed by this Act in respect to * * * the recovery of preferences * * * shall be suspended while a proceeding under this chapter [Chapter XI] is pending and until it is finally dismissed."

IV

No sound reasons exist for the granting of the petition for a writ of certiorari.

The decision of the Court of Appeals below represents the only reported decision of an appellate court as to the construction of Sections 302 and 378 of the Bankruptcy Act. As indicated above, contrary to Petitioner's contention, the decision below is in accord with the leading treatise on bankruptcy jurisprudence. The lower courts have not decided an important question of federal law which should be settled by this Court. The decisions below involved elementary and academic rules of statutory construction. In essence, Petitioner herein seeks to involve the Court in an academic debate concerning the construction of the provisions of the Bankruptcy Act which, thus far, have been uniformly construed. As stated in *Rice* v. *Sioux City Cemetery*, 395 U.S. 70, 74 (1955) "* * * this Court does not sit

to satisfy a scholarly interest * * *. Nor does it sit for the benefit of particular litigants."

The petition herein is sought only for the benefit of Kamerman & Kamerman and is not sought to settle any conflict of opinion and authority as between courts of appeal or even, if that were sufficient, treatises on the subject of the Bankruptcy Act and proceedings thereunder. Consequently, there exists no sound reasons in favor of the issuance of a writ of certiorari to the Court of Appeals.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES SELIGSON
Trustee in Bankruptcy
1290 Avenue of the Americas
New York, New York 10019
212-LT 1-7510

SELIGSON & MORRIS
HARVEY R. MILLER
Of Counsel

April 24, 1968